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IN THE

Supreme Court of the United States

October Term, 1967

No. 348

BENEFICIAL FINANCE COMPANY, INC.,
Petitioner,

v.

LEO VINE,
Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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1. Novel and Important Questions Relating to Section 10(b) and Rule 10b-5 Are Involved.

Nothing in the respondent's opposing brief refutes our contention that there are involved in this case the novel and important "Questions Presented" set forth on page 2 in our petition.

What respondent does is to take the broad position that the federal securities statutes cover all cases of alleged fraud without regard to the limitations of the statutory provisions—particularly the limitations appearing in Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder. That statute and rule prohibit fraud only in connection with the purchase or sale of a security and this must mean that they apply only if there are (a) a sale or purchase of a security and (b) fraud

in connection with such sale or purchase. Neither ingredient is present here where respondent claims to be a seller although he has never in fact sold his stock (or done anything else except bring this suit) and where there was admittedly no sale or purchase of a security by the corporation he claims to represent derivatively.

This is the first case in which it has been held under Section 10(b) and Rule 10b-5 that a minority stockholder who, under the applicable state statutes covering short form mergers has not been called upon to take any action to make the merger effective, nevertheless has, by reason of such short form merger, not only made a "sale" of the stock certificate he still holds but that there also has been fraud "in connection with" such supposed sale of such certificate although no representations whatever were made to him.

Respondent endeavors to make it appear that the holding of the Court of Appeals below (reversing the District Court) is well settled and narrow. However, that the decision is novel is shown by the Court of Appeals opinion itself which states (Petitioner's Appendix, pp. A-11 and A-12) (a) that in the one case involving somewhat similar facts (*Voege* v. *American Sumatra Tobacco Corp.*, 241 F. Supp. 369 (D. Del. 1965)), the District Court decided the case on a different theory from that evolved below* and (b) that there also was no other case squarely in point.

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* Respondent also asserts in his brief (pp. 16-18) that the Court of Appeals did not follow the different theory which the Securities and Exchange Commission supported in its *amicus curiae* brief. It should be pointed out that the Commission has never made any formal ruling or interpretation extending Rule 10b-5 to mergers of any sort and that the *amicus* brief is simply authored and signed by lawyers for the Commission and not by the Commission or any member. In this connection, it should also be pointed out that a more eminent counsel for the Commission filed a brief on its behalf taking the contrary position that a merger was not a sale (Petition, p. 8 fn.).

In this situation, the Court below, in order to sustain its ruling, invented the theory that effectuation of the short form merger made the respondent, who had in fact done nothing, a "forced seller" of his stock to the surviving corporation. We submit that this was judicial legislation because respondent was not a seller at all.

In fact, respondent and the Court of Appeals both advert to a phrase in the Securities and Exchange Act of 1934 out of context. This is the definition contained in Section 3(a)(14) of "sale" and "sell." They call attention to the phrase "otherwise dispose of" as if it referred to a disposition of some type other than by way of voluntary contract. But this is not so. It is clear that the definition refers only to a "contract to sell or otherwise dispose of," thus requiring volition in order for a transaction to come within the definition. There was certainly no volition on the part of the respondent. He did nothing in connection with petitioner's tender offers or the merger.

The respondent (pp. 9-10) cites and quotes from *J. I. Case Co.* v. *Borak*, 377 U. S. 426, 432 (1964), which refers to deceit practiced on stockholders as a group. That case is inapposite because the decision involved only the proxy rules promulgated under Section 14 of the Act which are not limited by their terms to purchase or sale of securities and fraud in connection with such purchase or sale. When this Court, in the above case, referred to deceit practiced on "stockholders as a group", it was sustaining the right of a stockholder to bring a derivative action on the ground that a deceptive proxy solicitation would lead to damage to the corporation and affect the stockholder only indi-

rectly.* The statutory provision and the issue involved in that case are entirely different from those involved in the present case.

Similarly, the citation by respondent (pp. 11-12) of *Dasho* v. *Susquehanna Corp.*, 380 F. 2d 262 (7th Cir. 1967) is inapposite because, like *J. I. Case Co.* v. *Borak, supra,* it involved a conventional merger in which stockholders were solicited to vote on the basis of alleged misrepresentations and omissions. Thus, the difference between that case and the present case is not, as claimed by respondent (p. 12), only that shares were exchanged for other shares instead of for cash. In the *Dasho* case, the plaintiffs were suing derivatively in the right of the corporation which was alleged to have been defrauded in acquiring securities and issuing its own securities, a clear Rule 10b-5 case. On the contrary, the derivative action attempted to be alleged by the plaintiff in the present case was dismissed by the District Court, and the dismissal was affirmed by the Court of Appeals (Petitioner's Appendix, p. A-18).

Several times in his brief (*e.g.*, pp. 5, 9), the respondent states that, following the short form merger, he was left

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* Respondent (p. 10) has sought to support his contentions by an inaccurate quotation from the *Borak* case. He has omitted from his quotation parts of the opinion which are needed in order to show what this Court did hold. The italicized words in the following quotation from the *Borak* opinion (377 U. S. at p. 432) shows the material which the respondent omits:

> "The damage suffered results not from the deceit practiced on him alone but rather from the deceit practiced on the stockholders as a group. *To hold that derivative actions are not within the sweep of the section would therefore be tantamount to a denial of private relief.* Private enforcement of the *proxy* rules provides a necessary supplement to Commission action. As in antitrust treble damage litigation, the possibility of civil damages or injunctive relief serves as a most effective weapon in the enforcement of the proxy requirements."

only with a claim for $3.29 per share. As the Court of Appeals pointed out (Petitioner's Appendix, p. A-10), the $3.29 figure represented an offer by the petitioner corporation and respondent also had a right of appraisal. This would have produced for him the full value of his shares if, as he alleges, that was greater than $3.29 per share, so that his rights were fully safeguarded.

2. Reckless Statements in Respondent's Brief Should Be Ignored.

Apparently in an attempt to strengthen the claimed "equity" of respondent's case, his counsel has indulged in reckless and unjustified statements in his brief regarding the allegations of the amended complaint and the determinations of the Courts below. These statements should be ignored.

There are no allegations in the amended complaint that age motivated Crown's officers in selling out (*cf.* Resp. Br., p. 4)*, or that the two companies had interlocking directorates at the time of the offers (*cf.* Resp. Br., p. 4) and there could be no such allegation, or that Beneficial did not set forth in its printed offer its arrangements to purchase the controlling Class B stock of Crown (*cf.* Resp. Br., p. 5) and there could be no such allegation, or that petitioner was aided by the Class B stockholders in obtaining acceptances of its offer by the holders of the Class A stock (*cf.* Resp. Br., pp. 5-6) and there could be no such allegation.

* On page 4 of his brief and footnote 1 thereto, the respondent refers to what he calls "key facts" stated to be taken from his proposed Second Amended Complaint in which respondent reverses his field and claims to be a defrauded purchaser instead of a seller, which pleading he was denied leave to file by the District Court, the denial being affirmed by the Court of Appeals (Petitioner's Appendix, pp. A-16 and A-17). It appears to us improper for respondent to rely in this Court on alleged facts appearing only in the pleading he was refused permission to file.

The District Court did not "concede" that petitioner's tender offer gave rise to a securities fraud cause of action by holders of Class A stock of Crown who accepted the offer, and the Securities and Exchange Commission brief did not characterize the offer as a clear violation of Rule 10b-5 (*cf.* Resp. Br., p. 5), but in each case said in effect only that the allegations of the amended complaint, if true, might constitute a cause of action.

3. The Decision Below Leads to Incongruous Procedural Results.

The *amicus curiae* brief filed by the Securities and Exchange Commission below demonstrates the impracticable procedure which would result in this and similar cases if the decision below were allowed to stand. The decision is that, while respondent did nothing and was not defrauded into making a sale, alleged misrepresentations were made to numerous other Class A stockholders who thereupon sold their stock and this brought respondent within the purview of Rule 10b-5 as if he were himself a defrauded seller. In this connection, in the *amicus curiae* Commission brief below (which is annexed to respondent's brief here) it is stated by the Commission that appellant [respondent here] could not recover if it should be found that those who did sell would have done so irrespective of any alleged misrepresentation or omission. The Commission said (Respondent's Appendix p. 37, footnote 3):

> "Of course, appellant's action here would fall if it should be found that those who sold pursuant to the tender offers would have done so despite the allegedly misleading representations or omissions."

It is extraordinary to contemplate that, under the decision of the Court below, in order to ascertain whether respondent has a Rule 10b-5 cause of action, it would be

relevant and necessary to explore the minds of over 2,000 Class A stockholders who did sell their stock years ago, but who have made no claim herein, in order to determine whether they relied on the alleged misrepresentations or omissions.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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